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A PROFESSIONAL CORPORATION

MEMORANDUM

DATE: November 19, 2002

RE: Permissibility of sports betting under Delaware and federal law

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We have been asked to consider the extent to which the State of Delaware may expand its current lottery games to include wagers on sports events. In summary, because of the interaction between Delaware's 1976 football lottery and certain federal legislation, Delaware has an opportunity shared only by three other states. We believe the opportunity is not limited to professional football and that a lottery involving other sports is permissible. Finally, because of a case disposing of legal challenges brought by the National Football League in 1976, we can speculate with some confidence about the potential claims one might imagine from professional sports organizations.

1. **Sports Gambling under Federal Law.** Because federal law limits (and, in most cases, prohibits) the authority of the several states to permit or conduct sports betting games, our analysis begins there. In 1992, Congress enacted the Professional And Amateur Sports Protection Act, 28 U.S.C. §§ 3701-3704 (the "*Act*" or "*PASPA*"), which generally forbids any new form of sports betting conducted by any state, governmental entity or person. However, Congress was aware that certain states, including Delaware, had already authorized and established sports betting games. Thus, the Act contains certain exclusions from its prohibitory reach, among which is "a lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State . . . to the extent that the scheme was conducted by that State . . . at any

The original version provided that the *Act's* prohibition would not apply to a lottery or other gambling scheme in a state "to the extent it was *actually conducted* by that State" during the relevant period. The amendment dropped the word "actually" from the grandfather provision even though that word continues to modify the word "conducted" in a separate provision offering other grandfathering protection not relevant to our facts. *See, PASPA,* §3704(a)(2)(B). The calculated excision of the word "actually" seems to signal an intention to broaden the scope of the word "conducted" and increase the flexibility available to the grandfathered states. To date we have found no discussion of the amendment in the *Congressional Record*, and continue to search for some insight into this apparently important amendment.

We think a second important insight into the Congressional objective sought by the *Act* can be found in the same *Senate Committee Report* passage quoted above: "At the same time, [the exception] does not intend to allow the expansion of sports lotteries into head-to-head betting." While we do not know if that phrase is a term of art in the gambling industry, two courts have used that term to mean single event wagering as opposed to pool card or parlay card betting.[1] Thus, we believe that a wager which depends on the results of more than one game is important, both to meet the *PASPA's* requirements and to maintain consistency with games run in Delaware during between 1976 and 1990.

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[1] In *National Football League vs. Governor of Delaware,* 435 F. Supp. 1372 (D. Del. 1977) (hereinafter "*NFL Case*"), Judge Stapleton apparently presumed that the terms "by event" and "head-to-head" wagering were synonymous. After reviewing the dollar volume of sports betting in Nevada, the Court noted that "[t]hese figures represent both 'by event' or 'head -to-head' betting and parlay card betting." *NFL Case* at 1379. The Delaware Supreme Court seems to agree. In a later case testing whether proposed jai-alai wagering was a "lottery," the Court distinguished the facts of the *NFL Case*, saying that "there the gambling games did not permit head-to-head betting (here the entire scheme is based on the result of a series of head-to-head games among the same competitors); . . . " *Opinion of the Justices,* Del. Supr., 385 A. 2d 695, 704 (1978)(hereinafter, the "*Jai-alai Advisory Opinion*").

time during the period beginning January 1, 1976 and ending August 31, 1990." *PASPA*, §3704(a)(1).

PASPA's history discloses an intent that Delaware be permitted to conduct whatever sports betting "schemes" were operated between 1976 and 1990. The Senate Judiciary Committee, chaired by Senator Biden, reported that

> [a]though the committee firmly believes that all such sports gambling is harmful, it has no wish to apply this new prohibition retroactively to Oregon or Delaware, which instituted sports lotteries prior to the introduction of our legislation.
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> . . .
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> Oregon and Delaware may conduct sports lotteries on any sport, because sports lotteries were conducted by those States prior to August 31, 1990. [The exception] is not intended to prevent Oregon or Delaware from expanding their sports betting schemes into other sports as long as it was authorized by State law prior to enactment of this Act. At the same time, [the exception] does not intend to allow the expansion of sports lotteries into head-to-head betting.

1992 U.S.C.C.A.N. 3553, 3559, 3561 ("*Senate Committee Report*") This legislative history offers important guidance about the Act's reach. First, while *PASPA* requires that, in order to escape its prohibition, a sports betting "scheme" must be one that "was conducted" by Delaware between 1976 and 1990, the *Senate Committee Report* confirms that, even if the actual game involved only football, Delaware would nevertheless be able to expand it to include other sports so long as the authorization for the game preceded the Act.

The above-quoted passage is not the only bit of legislative history suggesting that Congress intended that the grandfathered states have some flexibility in shaping their games even *after* the enactment of *PASPA*, notwithstanding the requirement that the later game have been "conducted" *prior* to the *Act.* The version of the *Act* considered by the Senate Judiciary Committee was amended upon reaching the Senate floor in a way we believe was significant.

2. **Delaware law and the history of the NFL Lottery operated by Delaware in 1976.** Delaware did, indeed, operate a sports betting game between 1976 and 1990, thus meeting the Act's first prerequisite. Those interested in understanding the features of that game are benefitted by Judge Stapleton's opinion in the *NFL Case (see* n.1 *infra)* – a lawsuit brought by the National Football League seeking to stop Delaware from offering certain football card games that commenced in September, 1976. In its opinion, the Court disposed of a host of claims not relevant to the subject of this memorandum – misappropriation of common law property rights; federal and state trademark violations; federal Constitutional claims; and violations of federal anti-gambling laws. However, the Court's treatment of claims brought under Delaware's constitutional prohibition against gambling and the State lottery statute (the "State Law Claims") offers helpful guidance on a number of issues.

Because any future game must be one that was "conducted" in the past, the Court's description of the Delaware game being challenged by the NFL provides helpful background:

> The Delaware football lottery is known as "Scoreboard" and it involves three different games, "Football Bonus", "Touchdown" and "Touchdown II." All are weekly games based on regularly scheduled NFL games. In Football Bonus, the fourteen games scheduled for a given weekend are divided into two pools of seven games each. A player must mark the lottery ticket with his or her projections of the winners of the seven games in one or both of the two pools and place a bet of $1, $2, $3, $5 or $10. To win Football Bonus, the player must correctly select the winner of each of the games in a pool. If the player correctly selects the winners of all games in both pools, he or she wins an "All Game Bonus." The amounts of the prizes awarded are determined on a pari-mutuel basis, that is, as a function of the total amount of money bet by all players.
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> In Touchdown, the lottery card lists the fourteen games for a given week along with three ranges of possible point spreads. The player

> must select both the winning team and the winning margin in each of three, four or five games. The scale of possible bets is the same as in Bonus and prizes are likewise distributed on a pari-mutuel basis to those who make correct selections for each game on which they bet.
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> Touchdown II, the third Scoreboard game, was introduced in mid-season and replaced Touchdown for the remainder of the season. In Touchdown II, a "line" or predicted point spread on each of twelve games is published on the Wednesday prior to the games. The player considers the published point spread and selects a team to "beat the line", that is, to do better in the game than the stated point spread. To win, the player must choose correctly with respect to each of from four to twelve games. Depending upon the number of games bet on, there is a fixed payoff of from $10 to $1,200. There is also a consolation prize for those who beat the line on nine out [sic] ten, ten out of eleven or eleven out of twelve games.
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> Scoreboard tickets are available from duly authorized agents of the Delaware State Lottery, usually merchants located throughout the State. The tickets list the teams by city names, e.g., Tampa or Cincinnati, rather than by nicknames such as Buccaneers or Bengals. Revenues are said to be distributed pursuant to a fixed apportionment schedule among the players of Scoreboard, the State, the sales agents and the Lottery Office for it administrative expenses.

NFL Case at 1376.

Turning to the State Law Claims, the Court first determined that the element of skill that might be present in a wager on a sporting event does not preclude that wager from being considered part of a "lottery" under Delaware law. So long as chance is the "dominant factor" in the game, the Court believed it qualified as a lottery. In order to determine that skill did not predominate in sports betting, the Court examined the "track record" of Jimmy the Greek, then a noted oddsmaker. While Jimmy the Greek correctly predicted the winner of 101 out of 126 NFL games during a certain period, he successfully predicted the "spread," or margin of victory, only 38 times. Thus, where a wager involves a point spread, chance becomes the

predominate factor. Moreover, "the element of chance that enters each game is multiplied by a minimum of three and a maximum of fourteen games." *NFL Case* at 1385. Thus, for a second reason, one appreciates that a wager involving more than a single game is important to the success of any renewal of the State's sports lottery.

Having concluded that the Delaware game was, indeed, a lottery under Article II, Section 17 of the Delaware Constitution,[2] the Court then considered whether certain features of the game complied with applicable State statutes, namely the revenue apportionment requirements of 29 *Del. C.* §§4805, 4815. These "technical" features must be considered in any plan to renew a sports game under the State Lottery. Fortunately, issues arising under these statutory provisions have probably been diminished due to amendments made to §4815 in the late '80's. Indeed, we believe those amendments may have overcome the reason for which the Court in the *NFL Case* invalidated one of the games – i.e. "Touchdown II."

At the time, Sections 4805 and 4815 required "that not less than 30% of the total revenues accruing from the sale of lottery tickets be paid into the General Fund of the State and that not less than 45% be distributed as prize money. Not more than 20% of the gross ticket sales may be devoted to administrative expenses. . . . ." *NFL Case* at 1387. We do not have the gambling industry expertise to know whether a new game can be successfully operated under these constraints. Were changes to those revenue apportionment parameters desirable or necessary, the following critical question arises: *Under PASPA, to what extent may Delaware vary features of its proposed game from that "conducted" in 1976?*

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[2] While the individual Justices of the Delaware Supreme Court, in opining about the validity of the 1977 legislation purporting to authorize pari-mutuel wagering on *jai-alai*, applied a different analysis to determine whether a game constituted a lottery, it rejected neither

If Congress intended to permit those states having pre-existing games the opportunity to manage their games flexibly, then amending the revenue apportionment requirements in relatively minor ways might not transform the game affected by those amendments into one *not* "conducted" prior to *PASPA*. Even if one concluded that those revenue apportionment provisions must remain the same, one begins to imagine methods to alter those requirements while maintaining literal compliance. For example, while 30% of those revenues must go to the General Fund, 29 *Del C.* §4805(a)(11)d, there is, naturally, no prohibition on the manner in which the General Assembly appropriates those revenues.

Turning next to the requirement that 45% of the game's revenues must be returned as "prizes," 29 *Del. C.* §4815(a), it is important to note that, while the Court in the *NFL Case* upheld most of the football lottery, the "Touchdown II" game was stricken because of its fixed payout as opposed to a payout that was determined under pari-mutuel principles. With such a feature, the Court concluded that the 45% requirement had been violated because of evidence showing that, on any given weekend, payouts might be much greater or smaller than 45%.

This infirmity, however, was presumably corrected in the late '80's when § 4815 was amended to allow the 45% requirement to be reached by averaging payouts over time. At the time of the *NFL Case*, §4815 provided that: "the Director shall first pay for the operation and administration of the lottery as authorized . . . and thereafter shall pay as prizes not less than 45 percent of the total amount of tickets which have been sold, which percentage shall include prizes already awarded." The unamended language did not authorize the averaging of payouts over time in order to determine whether the 45% requirement had been met.

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the holding of the *NFL Case* nor its method of analysis. *See Jai-alai Advisory Opinion* at 704. For further comparison of the *NFL Case* and the *Jai-alai Advisory Opinion*, *see, infra* at 7.

Section 4815 was later amended to provide that the Director "shall pay as prizes not less than 45% on the average of the total amount of tickets which have been sold and are scheduled for sale throughout the games, which percentage shall include prizes already awarded or to be awarded." Therefore, if Delaware can demonstrate an average return to players of 45% or more over time, then a fixed return, as opposed to a variable return determined by pari-mutuel principles should be compliant with State law.

Regarding the requirement that no more than 20% of "ticket sales" go to administration expenses, the experience with the Video Lottery suggests a variety of ways to meet this limit. In other words, if the 20% limit posed difficulty and even if one concluded that amending that provision would create unacceptable risks of non-compliance with *PASPA*, one imagines that there are ways to meet the expenses of a sports betting game and simultaneously comply with the 20% limit.

In all events, the next step seems to be to test these statutory features in effect in 1976 against the realities of the market for sports betting. To the extent that a proposed game varies a great deal from the 1976 football lottery, the greater the risk that the new game will not comply with *PASPA's* requirement that the game be one which was "conducted" in 1976.[3] Alternatively, to the extent that any necessary changes are relatively modest, the smaller the risk of *PASPA* violation. For example, the maximum bet permitted on one of the 1976 games was $10.00. We doubt that increasing that number would cause an otherwise compliant game to violate *PASPA*.

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[3] The football lottery had a quick end. On one weekend, heavy betting on one particular combination of football games caused concerned officials to cancel the lottery that weekend. While it was later reinstated and prizes were paid, the betting public lost confidence in the game and it was terminated before the next season.

3. **Is "Head-to-Head" or Single Game Betting Permissible?** One particular point, however, seems fairly clear – any wager permitted in a proposed game should involve more than merely the outcome of one sports contest. Single event, head-to-head betting is neither likely to comply with *PASPA*, nor likely to be considered a lottery under Delaware law.

First, *PASPA's* history makes clear that Congress did not believe it was permitting head-to-head sports betting by excluding Delaware from the *Act's* general prohibition: "[the exception for Delaware and Oregon] does not intend to allow the expansion of sports lotteries into head-to-head betting." That observation is correct -- Delaware did not conduct head-to-head betting as part of its game in 1976. Thus, it is difficult to argue that "the scheme [of head-to-head betting] was conducted . . . prior to August 31, 1990."

Next, while there might be a difference of opinion between the *NFL Case* and the members[4] of the Delaware Supreme Court in the *Jai-alai Advisory Opinion (see* n.1 *infra)* about what constitutes a lottery, there seems to be agreement that a head-to-head game would not be regarded as a lottery under Article II, Section 17 of the Delaware Constitution. In determining that "Touchdown II" constituted a lottery, the *NFL* Court observed that:

> the unknowable factors in each game are multiplied by the number of games on which the Scoreboard player bets. None of the games permits head-to-head or single game betting. Thus, the element of chance that enters each game is multiplied by a minimum of three and a maximum of fourteen games. In addition, in Touchdown II, the designated point spread or "line" is designed to equalize the odds on the two teams involved. This injects a further factor of chance.

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[4] Unlike the ordinary case, where an opinion of the Delaware Supreme Court speaks for the entire court and creates precedent, when offering an opinion to the Governor or General Assembly under 10 *Del. C.* §141, the work product delivered by the members of the Court is, in theory at least, a non-binding collection of the legal opinions by individual members of Delaware's highest court. *Satterthwaite v. Highfield,* Del. Supr., 152 A. 45 (1930).

435 F. Supp. at 1385. Thus, according to Judge Stapleton's view, a single event bet is relatively more dependent on skill and might not comply, therefore, with the requirement that chance be the predominating factor in a true lottery. In the *Jai-alai Advisory Opinion*, the Justices agreed that single event, head-to-head betting would not qualify as a lottery, pointing out that the game considered to be a lottery in the *NFL Case* "did not permit head-to-head betting." *Jai-alai Advisory Opinion* at 704.

Before concluding, we ought to say a further word about the *NFL Case*, the *Jai-alai Advisory Opinion* and what constitutes a lottery under Article II, Section 17 of the Delaware Constitution. While a reading of the two cases suggests that head-to-head betting would not be regarded by any future court as a lottery, some of the language found in the *Jai-alai Advisory Opinion* raises doubt about whether any wager involving sporting events could be regarded as a lottery. Indeed, the Justices quoted with approval words of the Alabama Supreme Court:

> In a lottery the winner is determined by lot. Lot or chance is the determining factor and a participant has no opportunity to materially exercise his reason, judgment, sagacity or discretion. In a horse race the winner is not determined by chance alone, as the condition, speed, and endurance of the horse and the skill and management of the rider are factors affecting the results of the race. . . . Horse racing, like foot races, boat races, football, and baseball, is a game in which the skill and judgment of man enter into the outcome to a marked degree and is not a game where chance is the dominant factor.

Jai-alai Advisory Opinion at 702, *quoting Opinion of the Justices*, Ala. Supr., 249 Ala. 516, 31 So. 2d 753, 761 (1947).

How, then, can we maintain that a game, conducted by the Delaware State Lottery, in which wagers are placed on sporting events, can be a lottery? First, it is important to note that the Court in the *Jai-alai Advisory Opinion* considered and did not reject Judge

Stapleton's conclusion in the *NFL Case* that betting on the results of several football games could be a lottery. Second, it is also important to note that the two courts agreed on the fundamental three elements of a lottery – "prize, consideration, and chance." *Jai-alai Advisory Opinion* at 700, *NFL Case* at 1383. Finally, while the Justices observed that, "by the great weight of authority, pari-mutuel betting has been held not to be a lottery[,]" *Jai-alai Advisory Opinion* at 702, they conceded that their conclusion was based exclusively on "pari-mutuel betting cases [involving horse] racing." Indeed, no other cases could be found. *Id.*

The important difference between that form of pari-mutuel wagering and the kind examined by Judge Stapleton is the existence of a point spread. In other words, when a gambler bets on a horse to win, he does so without regard to the number of lengths that will make up the winning margin. However, when that same gambler bets on a football game, picking the winner is not the end of the bet. He must also speculate on the winning margin. This margin, or spread, was a critical factor to Judge Stapleton in the *NFL Case* because it transformed a bet where skill predominated to a bet where chance would be the predominate factor. The existence of this equalizing spread was not considered by the Delaware Supreme Court in the *Jai-alai Advisory Opinion*. In other words, we do not believe that the *Jai-alai Advisory Opinion* establishes the proposition that use of pari-mutuel principles to determine the amount of a prize renders a betting game something other than a lottery. Instead, we think that if the use of point spreads transforms a game into one where even skilled players lose most of the time (like Jimmy the Greek in the *NFL Case*), then it will probably be regarded as a lottery under Delaware law.

We believe that the next step should be to determine, in some detail, what kinds of lottery games might be attractive to the betting public and still fit within the general legal guidelines suggested in this memorandum. Without knowing the precise details of a particular

game, it is not possible for us to opine on the likelihood that it would survive legal challenge. For example, it might be suggested that the apparent prohibition against single event, head-to-head wagering, raised by both federal and State law, might be avoided by a game that requires a bet on different aspects of one contest. To put more detail to the hypothetical, one might ask if federal and State law would be satisfied if a bettor could bet on both the winner of a football game (adjusted by the spread) and an "over/under" associated with that same game? Alternatively, may Delaware offer pre-season bets on which teams will appear in the Superbowl? We are certain that those with more expertise in the field of gambling will have several such proposals. This memorandum is not an attempt to opine on any particular proposed game. Moreover, the only thing that is certain at this point is that any game which varies at all from the 1976 game will carry with it some degree of uncertainty until authoritative advice has been sought. Thus, we believe that, in the event State officials are supportive of sports wagering, it would be prudent to seek an opinion of the members of the Delaware Supreme Court, in much the same way (and for the same good reasons) as their advice was sought in the *Jai-alai Advisory Opinion*.